In the

Supreme Court of the United States

October Term, 1943.

No.........................

W. E. VALLIANT & COMPANY, as Owner of the Motor
Vessel "E. MADISON HALL",

Petitioner,

v.

RAYONIER, INCORPORATED,

Respondent.

BRIEF IN SUPPORT OF PETITION

INTRODUCTION

We have stated in the petition, under the heading "Summary Statement", the substance of the opinions of both the District Court and the Circuit Court of Appeals, without criticism or argument, reserving such observations for the brief; and since important points of argument are based upon the complete absence of a factual basis for denial of limitation of liability, it is necessary to summarize such evidence as there is on this point. The evidence lies in small compass and the summary is intended to include all relevant evidence.*

Norris Leon Webster, referred to in the testimony and opinions as the mate, went on watch at midnight before the accident, to stand watch until six o'clock in the morning (R. p. 40). He was 38 years old, an A. B. seaman, had been following the water in sail and power boats in the Chesapeake Bay for 25 years, and had never done anything else (R. p. 42). Before the accident occurred, the master, Captain Jarrett, relieved Webster, came into the pilot house and took the wheel. Webster went out and had nothing more to do with the navigation of the boat. The first Webster knew of the accident was when the vessel hit, and he was then about to sit down to his breakfast (R. p. 41). He estimated the interval between the time he left the pilot house when the Captain came in, and the vessel's striking the wreck at between 10 and 12 minutes (R. p. 42). After the vessel had struck the wreck, Webster looked at the compass in the pilot house, which showed a change of compass course from the course he had been steering when he left the pilot house, of three-quarters of a point more to the northward (R. p. 43). Webster had seen the wreck about two weeks before the accident, while he was on board the "E. MADISON HALL" at night, with the vessel's searchlight, but could not tell exactly its position at that time (R. p. 46). At that time he passed the wreck to the eastward of it, bound down the Bay, at night (R. pp. 46, 47). On the morning of the accident, when Webster turned the watch over to the master, Webster told the master "We were around the vicinity of the wreck", and the master said "All right", and Webster then left the pilot house (R. p. 47). Webster had no license, but considerable experience on the water. He had tried twice to get a license, but did not pass the first aid test (R. pp. 44-45). Webster made no change in the course during his watch, up to the time the master took over (R. p. 45).

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*(Appendix A with the brief is a photostatic copy of the material part of a chart put in evidence. The locations referred to in the evidence are within the parallelogram marked.)

The master, Jarrett, held a master's license for bays and sounds, first class pilot, New York District, and from the Delaware River to Jacksonville, Florida, all the inland waterways, unlimited tonnage, and had held such licenses for about 28 years, and held them at the time of the accident. He also, at the time, had a pilot's license for Chesapeake Bay and tributaries (R. p. 2). On the morning of the accident he came on watch and entered the pilot house at 5:45. Before that he had been in his room asleep. When he took charge and the mate, Webster, told him about the wreck, he made a change of course, hauled just a little, but did not remember what degree he did haul (R. p. 4). When the master came on watch, he relieved Leon Webster, who then immediately left (R. p. 6). The change of course made by the master was towards the ship channel (R. p. 6). The speed of the vessel at the time of and preceding the accident, was 7½ miles an hour (R. p. 7) and the distance the vessel ran after the Captain took charge and made the change of course he spoke of was about three-quarters of a mile (R. p. 8).

FIRST POINT

The decisions of the District Court and of the Circuit Court of Appeals, denying limitation of liability, lack any evidentiary support on this point. The basis of judicial decision is absent.

We contend that there was no evidence justifying denial of limitation of liability for the following reasons:—The applicable part of the statute (R. S. 4283, 46 U. S. C., Sec. 183) limits the liability of the vessel owner for any loss of any property on board caused by any person on board, by collision or "for any act, matter or thing, loss, damage, forfeiture, done, occasioned or incurred *without the privity or knowledge of such owner or owners*". (Italics supplied.) The construction of the words "privity or knowledge" by this Court and inferior Federal courts has been uniformly to the effect that in order to deny limitation, it must be found that the privity or knowledge with which the owner may be charged *must cause or contribute to the loss,* and if that is not proved, limitation must be granted.

One of the earliest cases is *Lord v. Goodall etc. S. S. Co.* (C. C. Calif. 1877), 15 Fed. Cases 885, affirmed 102 U. S. 541. In the Circuit Court opinion, it is said "As used in the statute, the meaning of the words 'privity or knowledge', evidently, is *a personal participation of the owner in some fault or act of negligence, causing or contributing to the loss,* or some personal knowledge or means of knowledge, of which he is bound to avail himself, of a contemplated loss, or a condition of things likely to produce or contribute to the loss, without adopting the appropriate means to prevent it." (Italics supplied.) There is a full discussion of the purpose and object of this section of the act in granting limitation of liability in the opinion of the Circuit Court at pages 887, 888. The opinion in this Court affirming the Circuit Court decision granting limitation, deals only with the power of Congress to pass the law.

The Circuit Court of Appeals in the present case declared the law to be as we contend, "that limitation of liability will not be denied on the ground of a privity or knowledge of the owner, *unless it involves participation in some fault which caused or contributed to the injuries suffered.*" (Italics supplied.) (R. p. 86.) We contend that the undisputed evidence in the case at bar is that Webster, an unlicensed man, had nothing to do with causing the accident because he was not in charge of the ship nor even present in the pilot house for a material time before the accident occurred, and we further contend, on the other hand, that when the master, who was amply licensed, experienced and competent, took charge of the vessel, as he undoubtedly did, he alone was solely responsible for the things done and left undone which, together, constituted the direct and proximate cause of the loss—that is, the master failed to reduce speed and he did make a change of course. He was in full and sole charge of the navigation of the vessel for a period of at least five minutes, and a distance of three-quarters of a mile.

Assuming that the petitioner was unable to prove lack of its privity and knowledge with respect to Webster's not having a license, which is the only ground on which liability could be denied, the petitioner did prove lack of privity or knowledge with respect to the master, whose personal negligence caused the accident.

The grounds on which the District Court appeared to find privity or knowledge, and therefore denied liability, are quite wrong because it is quite clear that the District Court found privity or knowledge *with respect to the employment of the master.* In its opinion (R. p. 76), the Court discusses the negligence of the *master*, and includes among the negligent acts charged to him, the master's failure "to have aboard, as required, a first class pilot, the object of which was to provide his vessel with the neces sary safeguard which would result from having on board one thoroughly familiar with conditions existing in this particular locality. The fact that the mate, just prior to being relieved of the wheel, had used the searchlight, unsuccessfully, to locate the wreck, indicates his inadequate knowledge of the location of his vessel."; thus attributing this particular act of negligence to the *master,* but the petitioner proved that the master was fully licensed and competent, and was himself a first class pilot. It is well settled that a master is not an officer or agent of the corporate owner, whose negligence is attributable to the corporate owner, as a ground for denying limitation of liability. The privity or knowledge must be that of an officer of the corporation or a managing agent thereof, and a shipmaster is neither.

> *The South Coast* (C. C. A. Cal. 1934) 71 Fed. (2d) 891; Cert. den. 293 U. S. 627.
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> *City of Bangor v. Boston N. Y. & S. Co.* (D. C. Mass. 1936), 13 Fed. Supp. 648.

Further, in the District Court's opinion (R. p. 77) the Court says:

> "*Under such circumstances, there can be no question but that the vessel owner was in privity with the master with respect to the latter's negligence, which, as we have just shown, was unquestionably one of the proximate causes of the disaster.* Accordingly, the condition under which, alone, a vessel owner may have the benefit of the statute, has clearly not been met." (Italics supplied.)

It will be observed that the District Court found no negligence on the part of the mate, and does not discuss this point at all. The District Court apparently either ignored or overlooked the fact that it is only something which the mate did or left undone which might justify denial of limitation. The District Court took no notice of the proven facts that nothing happened while the mate was in charge of the vessel, that the master took charge of the navigation as has been stated, made a change of course and ignored the precautions which the Court thought the master should have taken. These failures were clearly the proximate cause of the accident.

The Circuit Court of Appeals, having precisely the same evidence before it as the District Court had, seeks to find some negligence on the part of the mate by means of speculation and surmise for which there cannot be found any supporting evidence. The Court says (R. p. 86):—

> "The mate, knowing that the wreck lay in the course of the ship, kept her full speed ahead without a proper lookout, on a dark and rainy morning, until she was within two-thirds of a mile of the unlighted wreck. (The evidence was three-quarters of a mile, R. p. 8.) He kept her on this course, although he knew that a change of course either to the east or west could be safely made so as to avoid all risk of collision. *It cannot be said that a qualified pilot would not have taken one of these alternatives. On the contrary, it is quite probable that such a pilot would have done so, and that all danger of collision with the wreck would have been avoided and the vessel would have passed Turkey Point on her port side and proceeded safely in a northeasterly direction up the Elk River to the Canal. Had either course been adopted, the vessel would have been out of danger when the master took charge and the collision would not have occurred.*" (Italics supplied.)

These statements, which cannot be called findings of fact because they are obviously assumptions and speculations, find no support in the evidence. The Court is assuming that the mate, who was a seaman of twenty-five years' experience, and familiar with the bay and tributaries, would have been endowed, by the mere possession of the license which he did not have, with some additional knowledge, and that he would have done something different from what he did. Furthermore, this portion of the opinion completely ignores the taking over of the control of the vessel by the master.

We are not unmindful of the line of decisions that concurrent findings of fact by the courts below will ordinarily not be disturbed, (*Just v. Chambers,* 312 U. S. 385 85 L. Ed. 905, 61 S. Ct. 687). But this is not such a case. *The District Court found nothing whatever with respect to the negligence of the mate,* and therefore on this important point there was nothing with which the Court of Appeals could concur. That Court itself undertook, as we have just shown, to supply this deficiency by assumptions and speculations of its own.

SECOND POINT

The doctrine of *The Pennsylvania,* 19 Wall. 125, 136, as to the burden of proof was wrongly applied to the case at bar.

We submit that the application of the *Pennsylvania* rule as to burden of proof *as the basis of decision in a limitation of liability case* is a novel and important question, affecting the whole shipping interest of the nation; and we contend that there is neither reason nor satisfactory authority for its application in the case at bar.

The Circuit Court of Appeals, after surmising that if the mate had had a license, he would, while he was in charge, have done something different from what he actually did, and after inferring that had the mate done one of several things the Court suggests he might have done, the vessel would have been out of danger when the master took charge and the collision would not have happened (R. p. 86), then says:

> "And where the owner has privity or knowledge of some violation of the statutes affecting the navigation of the ship, it is presumed, under the doctrine of *The Pennsylvania,* 19 Wall. 125, 136, that the fault is at least a contributing cause to the loss; and the owner must bear the burden of showing not merely that his fault probably was not, but also that it could not have been a contributing cause of the disaster. *The New York Marine No. 10,* 2 Cir. 109 F.(2d) 564, 566; *The Denali,* 9 Cir. 105 F.(2d) 413, 420. This burden has not been borne by the owner in the pending case, and the decree of the District Court must therefore be affirmed."

Note that the *basis of the decision of the case by the Circuit Court of Appeals* is the failure of the owner to meet "this burden"—i. e., to prove affirmatively that the failure of the mate to do things which the Court suggests he might have done, could not have been a contributing cause to the disaster. Limitation is denied because the vessel owner did not anticipate that a Court, almost two years after the accident, would presume to instruct the mate as to what things he might or should have done at the time, and substitutes its nautical opinion after the event for his own judgment at the time. A large liability is imposed because of the owner's failure to perform this feat of prophecy and mind-reading.

The mate testified he did not reduce speed because it was not time to hit the wreck (R. p. 48); that he had not come close enough to the wreck to slow her down; that "I run my watch okay, so that it was up to him (the master) about the wreck, after I told him about it." (R. p. 48).

The District Court did not cite or discuss the *Pennsylvania* at all.

What is the burden of proof rule as declared by this Court in *The Pennsylvania* case? The case, decided in 1874, was a collision in fog between the British steamer Pennsylvania and a British bark, in which the bark was sunk. The steamer was held at fault for excessive speed in fog, and the sailing vessel for ringing a bell instead of sounding a foghorn while under way. The British merchants' shipping Acts declared that ships shall use no other fog signals but those required by regulations, and if in a collision case, it appears to the Court that the collision was caused by non-observance of any regulation made by the Act, or in pursuance thereof, the ship by which the regulation is infringed shall be deemed to be in fault unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulations necessary. "Our own statute does not contain this provision expressed, but its meaning is the same." (At page 135). When the ship, *at the time of collision, is in actual violation of a statutory rule intended to prevent collisions,* it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributing cause of the disaster. "In such a case, the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute." This Court held both vessels at fault.

It will be observed that this rule originated in a case of collision between moving vessels, and is limited to a situation where a vessel at the time of collision, is in actual violation of a statutory rule intended to prevent collisions. With a few exceptions presently to be mentioned, including the case at bar, the frequent applications of it by this Court and inferior Federal Courts, have always been in vessel collision cases. The present case is not a collision case between moving vessels, and the violation of the statute referred to by the Circuit Court of Appeals (R. p. 87) is said to be the fact that the mate did not have a pilot's license and even though this lack is shown not to have been a cause of the loss, and even though a proximate and intervening cause was shown, the Circuit Court of Appeals, by applying *The Pennsylvania* rule, has laid upon the vessel owner the burden of proving that the lack of a pilot's license *could not* have been the cause of the accident. Obviously, in the present case the vessel was not, at the time of the accident, in actual violation of a statutory rule intended to prevent collisions.

Apart from the fact that the application of this burden of proof rule derived from *The Pennsylvania* case was not considered or even mentioned by the District Court, but was first applied by the Circuit Court of Appeals, we submit that it was improperly applied and without authority.

The rule has never been applied by this Court as a ground for denial of limitation of liability under the statute applicable to the present case; nor, it is believed, has it ever been applied by the inferior Federal Courts as a ground for denial of limitation of liability, save in the case at bar and the two other cases cited by the Circuit Court of Appeals (R. p. 87).

There is no legal reason why it should ever be so applied. The statutory scheme of limitation of liability, begun in

1851, is self-sufficient and self-contained, and this Court itself has never found it necessary to import this rule derived from a different statutory scheme (the statutes regulating actual navigation and the regulations thereunder), for the purpose of doing justice in limitation of liability cases. Nor is it necessary that the *Pennsylvania* rule as to burden of proof in collision cases should be introduced into the limitation of liability statute.

In a proceeding for limitation of liability, the vessel owner must prove absence of privity or knowledge with respect to the act or circumstance which causes the loss; and if he fails to do so, limitation is denied. There is no need for any presumptions in favor of or against either party.

In the *Denali,* cited by the Circuit Court of Appeals as 105 F.(2d) 413, there was a later opinion on rehearing, 112 F.(2d) 952, and this Court denied certiorari, 311 U. S. 687, under title *Alaska S. S. Co. v. Pacific Coast Co.* The only presently material facts in the *Denali* are that the loss was caused by stranding on the Alaska coast, and limitation was denied because of the owner's failure to establish and maintain three watches for the mates as required by statute, *which failure and privity therein was found to be the cause of the accident.* The purpose of the statute was to promote safety by preventing fatigue. A controlling fact was that the vessel was being navigated at the time of the accident by a mate who had been on duty four hours in excess of the number of hours prescribed by the three-watch system.

On rehearing, the Court held (112 F.(2d) 955):

> "The rule and presumption established in *The Pennsylvania,* 19 Wall. 125, 136, control in libels for injury

> to sailors or cargo, where the vessel has violated the positive command of a safety statute to prevent fatigue in the navigating officer controlling her navigation at the time that navigation caused the injury, whether by colliding with another vessel or with a reef on which she is stranded."

The Court therefore applied the rule in a stranding case and confined its application to the facts before it, which included the fact that the navigating officer was controlling the navigation at the time that navigation caused the injury. This is in accord with *The Pennsylvania* which conditioned the rule of burden of proof there declared upon the fact that the ship, at the time of collision, is in actual violation of a statutory rule intended to prevent collisions.

The factual differences from the case at bar are manifest. The mate of the *Hall* was not controlling her navigation at the time of the accident, but the master was solely in charge and control. The Ninth Circuit Court of Appeals was concerned with the application of the rule in non-collision cases, particularly stranding, and cited a number of authorities (none of which applied the rule as the Fourth Circuit Court of Appeals did in the case at bar), and said at page 957:

> "Entirely apart from these many authorities, and viewing the matter *a priori*, there seem to us compelling reasons why the violation of a statute to prevent loss of life and property by attempting to secure absence of fatigue by the vessel's navigators, shall have *The Pennsylvania* rule applied in suits against the owner which consciously has violated it."

The Court then further held (at page 958):

> "An owner affirmatively found to be privy to the violation cannot escape the application of the rule and

> presumption by compelling the injured persons to litigate their claims in a limitation proceeding.
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> "The Denali's owner's privity in and knowledge of the mate's navigation of the ship in violation of the safety act *at the moment of her running full speed on the charted reef* are authoritatively established by the proof." (Italics supplied).

Here again the Court strictly confines the application of the rule in limitation proceedings to the facts of the case before it, and the decision therefore should not be considered applicable to the case at bar.

This Court's denial of certiorari in the *Denali* case is without significance in its consideration of the present application.

> "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *U. S. v. Carver*, 260 U. S. 490.

New York Marine No. 10, 109 F.(2d) 564, 2 Cir. applied *The Pennsylvania* rule to the following facts: Limitation was denied the charterer of the Tug *New York Marine No. 10* in a case of collision between moving vessels in the New York Barge Canal because, while two deckhands were required to be on board, there was only one, said to be incompetent because inexperienced. The Court did not deny limitation on the latter ground, holding that failure to instruct the man in his duties was a fault chargeable to the master, and not to managerial agents of the corporate owner. The Court did deny limitation because the tug left Buffalo undermanned—short one deckhand—with the privity and knowledge of a managerial agent of the corporate owner, and said:

> "Since absence has been found and the lack is admitted to be a statutory fault * * * it is presumed that the fault is a contributory cause, and the petitioner must bear the burden of showing that it was not."

Citing *The Pennsylvania* and other cases.

This is a totally different factual situation. There was no one missing from the crew of the *Hall*. We therefore contend that the Circuit Court of Appeals was wrong in applying *The Pennsylvania* rule as a basis for denying limitation to the clear and undisputed facts in the case at bar.

The Aakre, 122 F.(2d) 469, 2 Cir., was a cargo damage suit against the Norwegian vessel and owner, with petition for limitation of liability by the vessel owner. The vessel stranded in the Bay of Fundy. The trial court found the stranding not caused by unseaworthiness, but due to error in navigation and granted limitation, and the Circuit Court of Appeals affirmed. The appellant cargo argued in the Circuit Court of Appeals that the burden of proof cast upon the petitioner for limitation by *The Pennsylvania* rule was something more than the burden of disproving a causal relationship.

The Circuit Court of Appeals reviewed the decisions of this Court as follows:

> "Indeed, however *The Pennsylvania* rule was originally stated, the history of its application shows that it has done no more than shift the burden of proof with regard to causality. That was all that was necessary to the decision of *The Pennsylvania* case itself, to the *Richlieu* case, supra, (*Richlieu and Ontario Navigation Co. v. Boston Marine Insurance Company,* 36 U. S. 408, 422), and to the *Martello,* 153 U. S. 64, 74; 14 S. Ct. 723; 38 L. Ed. 637; and *Lie v. San Francisco & P. F. S. Co.,* 243 U. S. 291, 298; 37 S. Ct. 270; 61 L. Ed.

> 726. It seems to have been disregarded altogether in *White Oak Transportation Co. v. Boston Cape Cod & New York Canal Co.*, 258 U. S. 341, 344, 42 S. Ct. 338, 66 L. Ed. 649, and was assumed to have done no more than to shift the burden in *Henry DuBois Sons Co. v. A/S Iverans Rederei*, 2 Cir. 116 F.(2d) 492, Cert. den., *The Ariosa v. A/S Iverans Rederei*, 61 S. Ct. 942, 85 L. Ed. 1526, 313 U. S. 568."

In a footnote, the Second Circuit Court of Appeals says:

> "We have regularly considered a violation of navigation rules from the standpoint of cause in collision cases, and not as a rule of absolute liability." (Citing authorities).

The opinion continues:

> "Still, if it (*The Pennsylvania* rule) were applied in the strongest sense conceivable, requiring the defaulting vessel to show that the inference of non sequitur was not only the most probable, but even the only possible, inference from the facts in evidence, appellant still could not succeed; for every point at issue in the case, including the captain's faith in his compass, was established by direct testimony."

In *Atlantic Refining Co. v. Moller (The Bohemian Club)*, 134 F.(2d) 1000, 3 Cir., a case of collision between a moving motor vessel and an anchored tanker, in fog, in the Delaware River, the District Court had held the moving vessel solely in fault, but on appeal the anchored tanker was also held in fault under the burden of proof rule of *The Pennsylvania* because the Circuit Court of Appeals thought the tanker did not meet the burden of showing that the position in which she anchored could not have been a contributing cause of the collision. This Court, however, reversed, exonerating the anchored vessel, and made no reference whatever to *The Pennsylvania* (88 L. Ed. 201, Dec. 1943).

The decisions in the instant case, the *Denali,* and *New York Marine No. 10* mark the beginning of an attempt to introduce the burden of proof rule of the *Pennsylvania* into the limitation of liability statutory plan, with the effect of bringing into that statutory scheme a novel method of determining the statutory right to limit liability, and a different method from that which the limitation statutes themselves prescribe—a method in conflict with the decisions of this Court and other Federal Courts, construing and applying the limitation acts. This is discussed briefly under our third point.

We have found no case in which this Court has recognized *The Pennsylvania* rule as a basis of decision in determining the right to limitation of liability. Whether the law is to be so or not is of the utmost importance to the whole shipping industry.

THIRD POINT.

The decision of the Circuit Court of Appeals, affirming denial of limitation, is in conflict with decisions of this Court, in that the decision is entirely contrary to the well-established and declared policy of this Court in construing and applying the statute. In *Coryell v. Phipps,* 87 L. Ed. 363, at p. 367, this Court said:

> "In the case of individual owners, it has been commonly held or declared that privity as used in the statute, means some personal participation of the owner in the fault or negligence which caused or contributed to the loss or injury"

(citing authorities), and continues:—

> "That construction stems from the well-settled policy to administer the statute, not 'with a tight and grudging hand', (Mr. Justice Bradley in *Providence & N. Y. S. Co. v. Hill Manufacturing Co.,* 109 U. S. 578,

589; 27 L. Ed. 1038, 1042; 3 S. Ct. 379, 617), but 'broadly and liberally' so as 'to achieve its purpose to encourage investments in shipbuilding and to afford an opportunity for the determination of claims against the vessel and its owner.'" (Citing authorities).

Coryell v. Phipps (Jan. 1943) is the latest decision of this Court on limitation of liability. The principle referred to was applied in that case in granting limitation to a stockholder of a vessel-owning corporation. In other decisions of this Court cited in *Coryell v. Phipps*, the same principle has been applied to the following situations:—

In *Larsen v. Northland Transp. Co.*, 292 U. S. 20, 24; 78 L. Ed. 1096, 1098; 54 S. Ct. 584, in favor of the ship owner as against the suggestion that the owner must initiate steps to obtain limitation before liability has been made to appear.

In *Flink v. Paladini*, 279 U. S. 59, 62; 73 L. Ed. 613, 614; 49 S. Ct. 255, in favor of the right of stockholders of a ship-owning corporation to have limitation, as against the argument that they were made individually liable for the debts of the corporation by the Constitution of California. In this case, Justice Holmes said, at page 63:—

> "We are of opinion that the words of the act must be taken in a broad and popular sense in order not to defeat the manifest intent."

In *Richardson v. Harmon*, 222 U. S. 96, at page 103, in extending the right to limitation to non-maritime torts.

In *Butler v. Boston S. S. S. Co.*, 130 U. S. 527, 549, 553, in extending the right of limitation to liabilities for injuries to persons.

Manifestly, it is contrary to this Court's declaration of the policy of the statute for the Circuit Court of Appeals, having no findings of fact before it nor any facts in the record justifying denial of limitation, to seek outside the record and find hypothetical reasons for denying limitation; while at the same time affirming that the statute should be construed liberally to effectuate the beneficial purposes of the legislation (R. p. 86).

The decision in the instant case is in conflict with *Southern Pacific Company v. United States*, 72 Fed. (2d) 212, 2 Cir. This case arose from a collision in New York Harbor between two steamships. Each owner petitioned for limitation of liability. The District Court found both vessels at fault and both owners entitled to limit. The owners of the cargo on the *El Sol* appealed from the allowance of limitation to the *Sac City* because when the latter broke ground, out of the complement fixed in her certificate, a first assistant engineer was missing, and the United States, her owner, had such notice of this as would charge a private owner. The Court said sailing without the required complement was, in effect, a statutory fault and assumed, without deciding, that *The Pennsylvania* rule applied, but declined to draw any *inferences* connecting the absence of the first assistant engineer with the cause of collision. The first engineer had testified he remained at his post continuously up to the time of collision and properly executed orders to the engine room. The Court characterized the inference that the first engineer may have left his post and delayed executing critical orders, thus possibly causing the collision, as "a house of cards", and said:—

> "It is difficult to be serious in discussing such phantoms." (p. 215).

The decision below, granting limitation to the owners of the *Sac City* was affirmed.

At page 214, the procedure in limitation of liability cases is discussed, and we submit it has a definite and important application to the case at bar. The Court said:—

> "When he (vessel owner) proceeds by petition, he does not change his legal position on the main issues. *The claimant (cargo owner) must prove what he must prove if he were an actor; a definite tort or contract and petitioner's connection with it. Petitioner need show no more than that he was not privy to the wrong which the claimant has proved."* (Italics supplied.)

In the instant case, the cargo proved a loss by the fault of the vessel. The vessel claimed limitation, proved no privity as to a competent master in control at the time of the loss. The cargo replied, you cannot have limitation because you had aboard an unlicensed mate and that is a statutory fault. The vessel replies, there was such a man aboard but he was not in control of the vessel at the time of the loss.

In the instant case the Court said, we think the mate's lack of license did contribute to the loss, because if he had had one, he would have taken steps to avoid the loss while he was still in charge. This, we contend, is pure inference. And the Court said, in any event the owner has failed to prove that lack of the license could not have caused the loss; which, as we have endeavored to show under the second point, is a standard inapplicable to the facts of this case, and an unreasonable and improper burden to impose as a condition of granting limitation of liability.

We refer to the District Court decision in *Southern Pacific Co. v. United States, supra,* 45 Fed. (2d) at 855, in which Judge Woolsey stated the law as follows:—

> "To preclude limitation on the ground of privity or knowledge, it is not, in my opinion, sufficient merely to prove that there was a failure in equipment, inspection or personnel, to which the ship owner was privy, or of which he had knowledge. It must be shown that the fault of equipment, inspection or personnel actually contributed to the accident in respect of which the ship owner seeks limitation.
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> "This is a practical world, and an omission to which the ship owner is privy but which has not any causal connection with the damage for which claim is made, is venial in the eyes of the law. The *Thessaloniki*, 267 Fed. 67, 70, C. C. A. 2."

The present decision is in conflict with the *North Star*, 255 Fed. 955, 2 Cir. This was a night collision case between passing vessels in the North River, in which limitation was claimed by the owner of a tug and denied by the District Court on the ground that the mate of the tug was not on board at the time, and that a lookout did not have a license. The Circuit Court of Appeals modified the decision below on this point and granted limitation of liability, saying that the fault that the mate was not on board the tug and the lookout not licensed, had nothing whatever to do with the collision, and that the collision was due to negligent navigation.

The instant decision is also in conflict with *Hartford and New York Transportation Company v. Rogers & Hubbard Co.*, 47 Fed. (2) 189, 2 Cir. (1931). This was a Harter Act case in which exemption as to cargo damage was granted to the owners of a vessel, the crew of which was deficient in that there was but one able seaman aboard, although the inspectors' certificate required two. The Court said, at page 191, that "failure to comply with the terms of the certificate would subject those responsible for the irregularity to penalties, but would not necessarily render the vessel unseaworthy. Seaworthiness in respect to a cargo of a vessel depends on whether the personnel is competent to perform maritime services, and not on certificates. The personnel in the present case was satisfactory."

On page 192, the Court said:—

> "A disregard of a statute or regulation does not make a vessel an outlaw and deprive her of the benefits of the Harter Act when her neglect has nothing to do with the cause of action asserted against her." (The Harter Act, Feb. 13, 1893, c. 105, sec. 2, 27 Stat. 445, 46 U. S. C. ......, secs. 191-194, is a part of the limitation of liability statutory plan.)

The instant decision is also in conflict with *The 84H*, 296 Fed. 427, 2 Cir. (Cert. den. 264 U. S. 596). This was a suit for personal injuries and death against the scow *84H*, with petition for limitation by the vessel owner. There is an authoritative discussion of the limitation of liability act with a review of the decisions of this Court at page 431. While the Court held that the petitioner for limitation should have been exonerated from liability, it said:—

> "The statute withholds the right to limit liability if the shipowner had 'privity or knowledge' of the fault which occasioned the damages to be recovered. The privity or knowledge must be actual and not merely constructive. It involves a personal participation of the owner in some fault or act of negligence causing or contributing to the injury suffered. There must be some fault or negligence on his part or in which he in some way participates."

In this connection the Court quotes extensively from *La Bourgogne*, 210 U. S. 95, 122, as to the meaning of the words "privity or knowledge".

The instant decision is also in conflict with *The Thessaloniki,* 267 Fed. 67, 2 Cir. The District Court, in a careful opinion, 267 Fed. 71, denied limitation because the vessel's boilers and engines were found unseaworthy at the beginning of the voyage with the knowledge of the owner. The Circuit Court of Appeals, upon the same evidence, found the proximate cause of the loss was a peril of the sea, reversed the decision of the District Court and granted limitation, clearly upon the ground that the charge against the owner had no relation to the cause of the loss.

The Princess Sophia, 61 Fed. (2d) 339, cert. den. 288 U. S. 604, 9 Cir., was a case in which this passenger vessel of Canadian corporate ownership stranded on the Alaska coast and all on board were lost. The owner claimed limitation, and because of the serious nature of the case, the matter was very carefully considered in an elaborate opinion. While the Court held that as to life saving equipment, the vessel owner was subject to the Canadian laws and regulations and had complied with them, serious charges were made of violations of the American laws and regulations as to manning, insufficiency of crew and life boats, with the privity and knowledge of the owner. The Court held that these matters did not have any causal relation to the disaster (p. 348) and would not therefore bar limitation of liability.

Hines v. Butler (The Virginia), 278 Fed. 877, cert. den. 257 U. S. 658, 4 Cir., is a decision binding in principle on the Circuit Court of Appeals in the instant case. The case arose out of the burning of the *S. S. Virginia,* causing loss of life, personal injury and cargo damage. In its own opinion the Circuit Court of Appeals reviewed and adopted the reasoning and application of authorities by the District Court in the opinion below, 264 Fed. 986; and it is necessary to refer to the latter opinion. At page 997 there is a brief and acute review of the decisions of this Court as they then stood (1920) and District Judge Rose quoted *Capital Transportation Co. v. Cambria Steel Co.,* 249 U. S. 334, to the effect that this Court very much appreciated "the danger that the act should be cut down from its intended effect by too easy a finding of privity or knowledge on the part of owners", and added:—

> "We are not disposed to press the law in those directions further than the cases go."

Judge Rose observed that the determination in other respects to give the statute a liberal construction for the benefit of owners was shown in the then latest decision—*Liverpool, Brazil and River Plate Steam Navigation Co. v. Brooklyn Eastern District Terminal,* 241 U. S. 48. After denying limitation of liability as to personal injury and death claims of passengers under other statutes, he held that as to cargo claims, limitation must be granted on the ground that since privity or knowledge with respect to the faults causing loss of cargo were doubtful, the policy of the statute should be given effect. The Fourth Circuit Court of Appeals affirmed.

The conflict which we respectfully insist exists between all of the cases above cited, one from the Fourth Circuit itself and from two other Circuits, and the case at bar, is in the principles of decision, and in the application of the limitation of liability act. All of the cases deal with and apply R. S. 4283 or limitation statutes of similar purpose. In all, the decisions were founded upon the well-settled principle that even though a vessel owner failed to prove lack of privity or knowledge with respect to some detail of operation of the vessel—undermanning, as in the case of the *El Sol*, the *North Star* and *Hartford & New York Transportation Co. v. Rogers & Hubbard Co.;* deficiency of boilers as in *The Thessaloniki;* negligent methods of work as in the *84H;* deficiency of equipment and personnel, as in the *Princess Sophia;* doubt as to privity or knowledge as in *The Virginia*—and even though these were found to be statutory faults, still limitation was granted unless it were also shown that the faults had causal relation to the loss. Even in the *Denali*, which we have criticized and distinguished as an authority for the present case for other reasons, the causal relationship was found (This brief, p. 20).

In the last three of the above cases, the policy of this Court in administering the statute, as re-affirmed in *Coryell v. Phipps*, was followed as a principle and affected the decisions.

The present decision is unique in that it gives legal lip service both to the beneficent purposes of the statute and to the principles of decision of the Circuit Courts of Appeals cases above cited, and then violates both purpose and principle in applying them to the case before that Court.

DISREGARD OF GENERAL ADMIRALTY RULE 46½.

Proper disposition of this case was made very difficult, if not impossible, by disregard by the District Court of this Rule.

Congress provided by Act of February 13, 1925, c. 229, sec. 1, 28 U. S. Code, sec. 771, as follows:—

> "Trial of Issues of Fact in Admiralty Causes.
>
> "The district courts of the United States, in deciding causes of admiralty and maritime jurisdiction on the instance side of the court, shall find the facts and the conclusions of law upon which it renders its judgments or decrees, and shall state the facts and conclusions of

law separately. . . ." (The rest of the statute, providing for jury trial in certain circumstances, is omitted.)

Pursuant to this statutory authority, this Court promulgated General Admiralty Rule 46½ on June 2, 1930, effective October 1, 1930, providing as follows:—

> "Findings of Fact and Conclusions of Law
>
> "In deciding cases of admiralty and maritime jurisdiction, the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record, and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under Rule 49."

For text of the rule and discussion of the practice, see Benedict on Admiralty, 6th ed., Vol. 3, pp. 120-123.

The statute which is the source of the rule is mandatory in its terms, and so is the rule. In the instant case the rule was not complied with. The District Court did not make any special findings of fact, nor state separately its conclusions of law, as its opinion shows (R. p. 74). Nor were counsel invited or directed to submit findings. There is a recital in the final decree signed some time later that the oral opinion from the Bench stated such findings and conclusions (R. p. 79).

In a recent typical case, *Matton Oil Trans. Co. v. The Dynamic*, 123 F. (2d) 999, 2 Cir., at page 1000, in a precisely similar situation, the Court discussed this rule, noted its substantial similarity to Rule 52(a), Federal Rules of Civil Procedure, 28 U. S. C. A. following Sec. 723C, and reversed and remanded the case with directions to the District Court to comply with the rule. The Court referred to the "insistence" of this Court upon appropriate findings, and cited, among other cases, *Mayo v. Lakeland Highlands Canning Co.*, 309 U. S. 310, 316, in which this Court said:—

> "The observations made in the course of the opinion are not, in any proper sense, findings of fact on these vital issues. Statements of fact are mingled with arguments and inferences for which we find no sufficient evidence either in the affidavits or the oral testimony.
>
> "It is of the highest importance to a proper review of the action of a Court in granting or refusing a preliminary injunction that there should be fair compliance with Rule 52(a) of the Rules of Civil Procedure."

The decree was reversed and the cause remanded with instructions that any action taken by the lower Court shall be upon findings of law and conclusions founded on the evidence in accordance with the rule referred to.

It is not too much to say that if attention had been paid to the rule, concentration by the District Court upon proper findings would have made apparent the lack of evidence relating the mate's action to the loss in the instant case, and a just result would have been reached. The Circuit Court of Appeals had no findings before it at all.

FOURTH POINT.

The decision of the Circuit Court of Appeals unsettles the law as to the construction and application of the Federal statute affecting the whole shipping interest of the nation; and leaves the industry in doubt as to its rights and obligations.

Large investments have been and are made in merchant shipping with the knowledge that Congress, beginning almost one hundred years ago, declared its purpose to encourage investment in vessels by extending to vessel owners an opportunity to avoid ruinous losses arising out of a single disaster, by limiting such a loss to the value of the vessel concerned and her freight, upon the conditions stated in the limitation statutes, and in the manner prescribed by the rules of this Court.

> *Robinson on Admiralty,* 875, Chapter 18, contains a general treatment of the subject.

Congress itself has never restricted the privileges extended to vessel owners by the Act of 1851 until 1935 and 1936, when, as is said, as a consequence of the Morro Castle disaster in 1934, R. S. 4283 was amended to require a minimum limitation fund in cases of personal injury or death upon seagoing vessels, and providing for a conclusive presumption of privity or knowledge with respect to the master of a sea-going vessel (46 U. S. C., Sec. 183 Supp. p. 36). At that time three new sections were added with the general effect of limiting the time for filing a petition for limitation (46 U. S. C., secs. 183(b), 183(c) and 185). These changes have no application to the present case.

This Court, as the typical cases above cited (pp. 25, 26) show, has given full effect to the purposes of the legislation.

The limitation statutes and the consistent construction and application of them by this Court are well known and have been long relied upon by the shipping industry. The present case represents a departure from the established law as now understood on important principles of maritime law of wide application, relating to the limitation of liability of vessel owners, and cannot but have a grave and adverse effect on the industry.

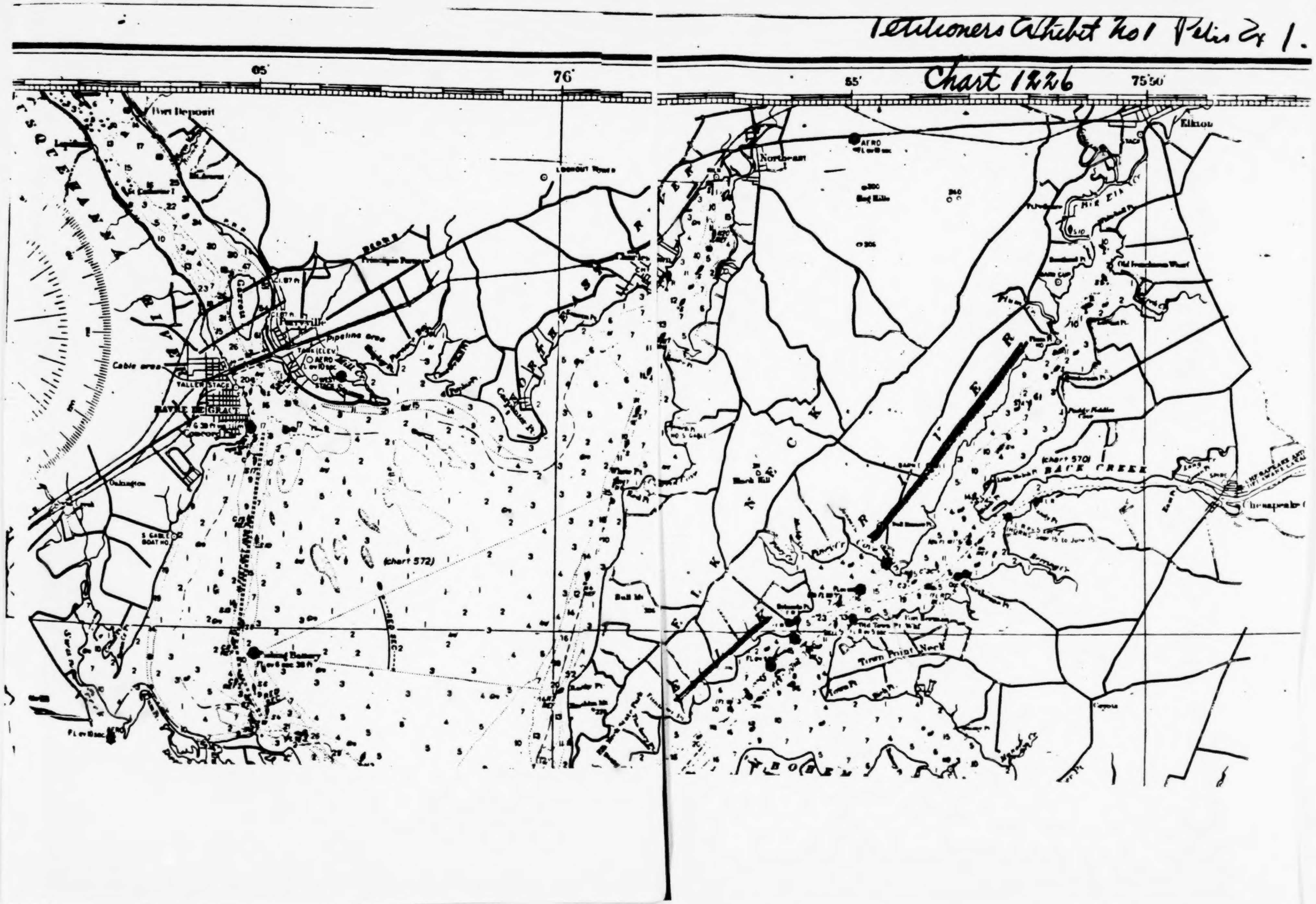
CONCLUSION.

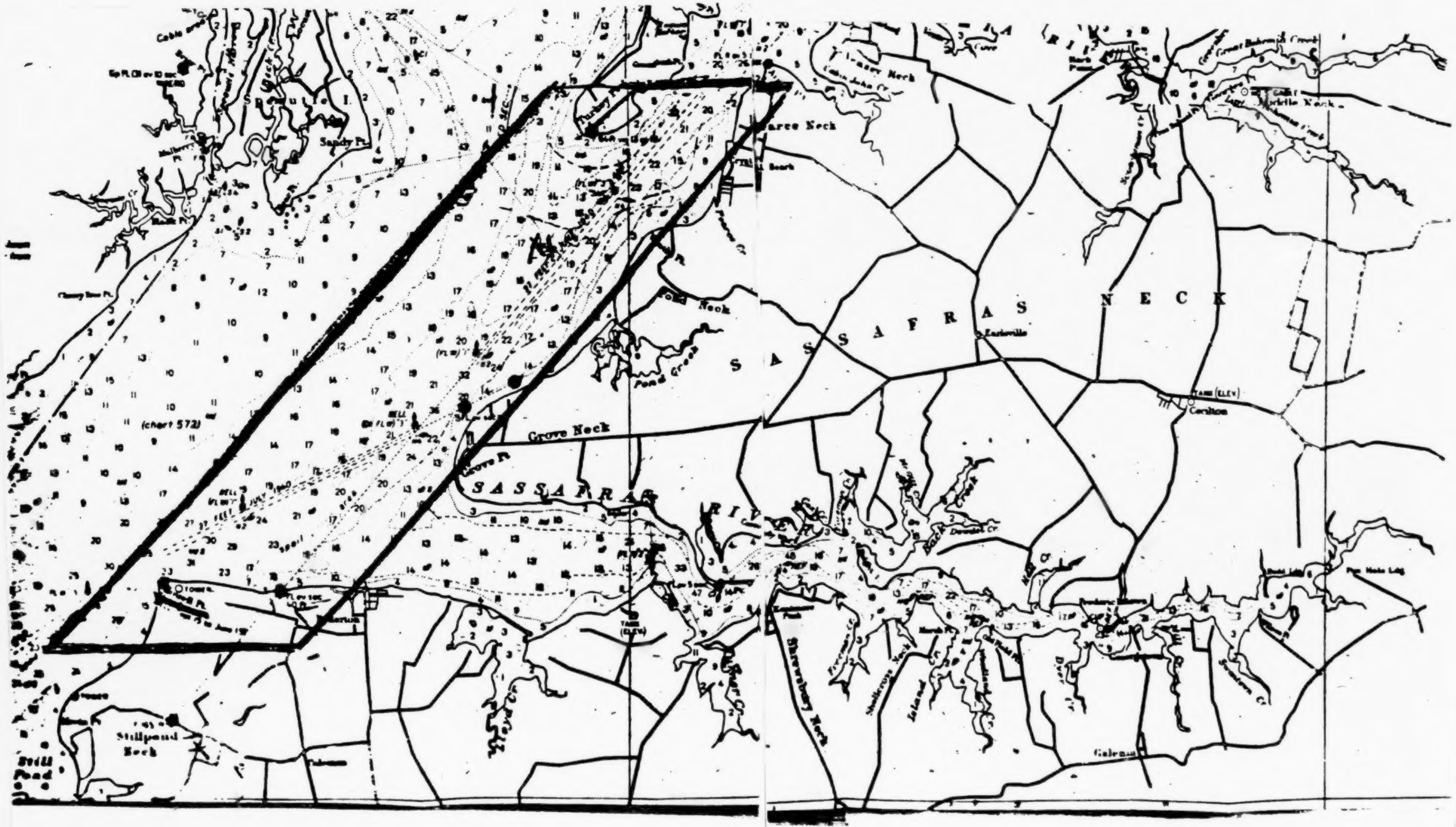
It is respectfully submitted that the writ of certiorari prayed for should be granted, that the decision of the Circuit Court of Appeals denying limitation of liability be reversed with costs, and that limitation of liability be granted.

JOHN H. SKEEN,
Counsel for Petitioner.

Petitioners Exhibit No 1 Petrs Ex 1.

Chart 1226


65'
76'
85'
75°50'
Elkton
Northeast
Perryville
Havre de Grace
Cable area
Pipeline area
(chart 572)
(chart 570)
BACK CREEK
Fishing Battery
Town Point Neck


Sandy Pt.
(chart 572)
Pond Neck
Pond Creek
SASSAFRAS NECK
Earleville
Cecilton
Grove Neck
Grove Pt.
SASSAFRAS RIVER
Stillpond Neck
Still Pond
Shrewsbury Neck
Galena